No. 98-1923 JUN 1 1999

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In The
Supreme Court of the United States

JOHN S. FREUND,
Petitioner,

v.

ROBERT A. BUTTERWORTH,
Attorney General,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER (A) THE FINDING THAT THE PETITIONER WAIVED HIS RIGHT TO CONFLICT-FREE COUNSEL BY HAVING FAILED TO "EXPRESS DISSATISFACTION" WITH HIS COUNSEL CONFLICTS WITH *UNITED STATES v. CRONIC*, 466 U.S. 648 (1984) AND *JOHNSON v. ZERBST*, 304 U.S. 458 (1938); (B) A TRIAL COURT'S FAILURE TO CONDUCT AN INQUIRY, DESPITE BEING ALERTED IN PRETRIAL PROCEEDINGS TO COUNSEL'S ACTUAL CONFLICTS OF INTEREST, CONSTITUTES SIXTH AND FOURTEENTH AMENDMENT VIOLATIONS UNDER THIS COURT'S DECISIONS IN *HOLLOWAY v. ARKANSAS*, 435 U.S. 475 (1978) AND *WOOD v. GEORGIA*, 450 U.S. 261 (1981) AND MANDATES A NEW TRIAL IN THE ABSENCE OF A VALID WAIVER BY THE PETITIONER OF HIS RIGHT TO CONFLICT-FREE COUNSEL?

II.

WHETHER: (A) THE COURT OF APPEALS ERRED IN RULING THAT THE SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL IS NOT VIOLATED WHERE COUNSEL LABORS UNDER PERSONAL CONFLICTING INTERESTS AND IN INTERPRETING *CUYLER v. SULLIVAN*, 446 U.S. 335 (1980) AS PROHIBITING COUNSEL FROM LABORING UNDER CONFLICTS OF INTEREST IN ONLY TWO CONTEXTS: (1) COUNSEL'S "SIMULTANEOUS REPRESENTATION" OF CLIENTS WITH CONFLICTING INTERESTS; AND (2) COUNSEL'S "SUCCESSIVE REPRESENTATION" OF CLIENTS WITH CONFLICTING INTERESTS AGAINST WHOM A FORMER CLIENT APPEARS AS A WITNESS; (B) THE TEST ADOPTED BY THE COURT OF APPEALS FOR

PROVING AN "ACTUAL CONFLICT OF INTEREST" IN THE SUCCESSIVE REPRESENTATION CONTEXT MISINTERPRETS *CUYLER* AND THE SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL AND ALSO CONFLICTS WITH *UNITED STATES v. FULTON*, 5 F.3d 605 (2d Cir.1993) BY REQUIRING THE HABEAS PETITIONER TO SHOW THAT COUNSEL'S PRIOR REPRESENTATION WAS SUBSTANTIALLY RELATED TO THE PRESENT CASE OR INVOLVED A DISCLOSURE OF CONFIDENTIAL INFORMATION, AND BY FINDING INSUFFICIENT AS A MATTER OF LAW THE PETITIONER'S SHOWING A CONFLICT ARISING FROM HIS COUNSEL'S OWN PERSONAL CONFLICTING INTERESTS.

III.

DOES THE DECISION OF THE COURT OF APPEALS CONFLICT WITH *HOLLOWAY v. ARKANSAS*, 435 U.S. 475 (1978) AND DID THE COURT OF APPEALS ERRONEOUSLY INTERPRET *UNITED STATES v. CRONIC*, 466 U.S. 648 (1984), *NIX v. WHITESIDE*, 475 U.S. 157 (1986) AND ETHICAL CONSIDERATIONS IN RULING THAT COUNSEL FOR AN ACCUSED IS PROHIBITED FROM PRESENTING A BLAME-SHIFTING DEFENSE WHERE THE ACCUSED HAS TOLD COUNSEL THAT HE COMMITTED THE CRIME CHARGED AND WHERE COUNSEL LABORED UNDER CONFLICTS OF INTEREST WHICH DETERRED THE INVESTIGATION AND PRESENTATION OF A BLAME-SHIFTING DEFENSE?

TABLE OF CONTENTS

Questions Presented for Review i

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of the Basis for Jurisdiction 2

Constitutional Provision Involved 3

Statement of the Case 4

Argument 15

TABLE OF AUTHORITIES

Cases:

Beets v. Collins,
986 F.2d 1478 (5th Cir.1993), *modified*,
65 F.3d 1258 (5th Cir.1995) 23

Beets v. Scott,
65 F.3d 1258 (5th Cir.1995) 22

Cuyler v. Sullivan,
446 U.S. 335 (1980) ..... passim

Fitzpatrick v. McCormick,
869 F.2d 1247 (9th Cir.1989) 22

Freund v. Butterworth,
117 F.3d 153 (11th Cir.1997) ..... passim

Freund v. Butterworth,
165 F.3d 839 (11th Cir.1999) 1, 2, 4

Freund v. State,
506 So. 2d 437 (Fla.4th DCA 1987), *aff'd*,
520 So. 2d 556 (Fla.1988) 11

Glasser v. United States,
315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) 16

Herring v. New York,
422 U.S. 853, 95 S.Ct. 2550,
45 L.Ed.2d 593 (1975) 16

Holloway v. Arkansas,
435 U.S. 475 (1978) ..... passim

Johnson v. Zerbst,
304 U.S. 458 (1938)..... i, 15, 17

Nix v. Whiteside,
475 U.S. 157 (1986)..... ii, 14, 25, 26

Smith v. White,
815 F.2d 1401 (11th Cir.), *cert. denied*,
484 U.S. 863 (1987)..... 21, 22

Strickland v. Washington,
466 U.S. 668 (1980)..... 13, 21, 23

United States v. Cronic,
466 U.S. 648 (1984) ..... passim

United States v. Fahey,
769 F.2d 829 (1st Cir.1985)..... 12

United States v. Fulton,
5 F.3d 605 (2d Cir.1993) ..... ii, 20, 23

United States v. McLain,
823 F.2d 1457 (11th Cir.1987) 22

Von Moltke v. Gillies,
332 U.S. 708, 168 S.Ct. 316, 92 L.Ed. 309 (1948) 17

Wood v. Georgia,
450 U.S. 261 (1981)..... i, 15, 18, 22

Zamora v. Dugger,
834 F.2d 956 (11th Cir.1987) 22

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 12

OPINIONS BELOW

The opinion of the court of appeals is reproduced in the Appendix filed herewith ("App.") at App. 1-117, and is reported at *Freund v. Butterworth*, 165 F.3d 839 (11th Cir.1999) (en banc) ["*Freund II*"].

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed is the en banc decision of the United States Court of Appeals for the Eleventh Circuit in *Freund v. Butterworth*, 165 F.3d 839 (11th Cir.1999) (en banc) ["*Freund II*"], which was entered January 22, 1999. A copy of the decision appears in the Appendix at App. 1-117. A timely filed application for extension of time for filing this petition for writ of certiorari was granted to June 4, 1999. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI provides:

In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The petitioner, Dr. John Freund, was jointly charged along with John Trent with the murder of Ralph Walker. The petitioner retained the law firm of Foley, Colton and Duncan ["law firm"]. During various pretrial proceedings in the state trial court, disclosures were made concerning the law firm's social, business and criminal relationships with Trent, his criminal cohorts, and key prosecution witnesses against the petitioner. Although the state trial judge was apprised of the potential conflicts of interest, the judge conducted no inquiry of the petitioner to apprise him of the conflicts or determine if he desired to waive the conflicts or seek conflict-free counsel. Following a trial by jury, the petitioner was found guilty of first degree murder. After exhausting state remedies, petitioner sought federal habeas corpus relief for violations of his Sixth Amendment right to conflict-free counsel. The United States Magistrate Judge entered a report and recommendation that the petition be denied (App. 118-134) which the district judge adopted as its judgment. (App. 135-136). On appeal to the United States Court of Appeals for the Eleventh Circuit, a unanimous panel reversed. *Freund v. Butterworth*, 117 F.3d 153 (11th Cir.1997) ["*Freund I*"]. The State of Florida sought rehearing en banc which was granted and the panel opinion was vacated. 135 F.3d 1419 (11th Cir.1998). The en banc court affirmed the district court by a vote of 7 to 4 in *Freund v. Butterworth*, 165 F.3d 839 (11th Cir.1999) (en banc) ["*Freund II*"]. (App. 1-117).

The pertinent facts are extensive and can be found in the decision sought to be reviewed at App. 1-42. For the purpose of this petition, those facts are summarized as follows.

Before 1983, the petitioner practiced oncology, the treatment of cancer, in Palm Beach, Florida. He enjoyed an excellent reputation in the medical community for both his professional expertise and personal demeanor. In June 1983,

he attempted suicide at home. He was found unconscious and subsequent tests indicated brain damage due to a lack of oxygen which affected his memory and judgment. (App. 2).

The co-defendant, Trent, was the son of one of the petitioner's patients. Trent enjoyed a reputation of wielding significant, though illicit, influence in the Palm Beach community. Trent's main occupation was a full-time criminal. Prosecution witness Eleanor Mills ran a female escort service and frequently used drugs. In early 1984, an undercover police officer arrested her after she attempted to sell him a kilogram of cocaine. While in pretrial detention, Mills met someone who suggested that Trent, then a stranger to Mills, could help her with the drug charges. Trent referred Mills to the law firm which represented him, Foley, Colton and Duncan. Mills's 16-year old daughter was Lisa Angelilli, another witness for the prosecution. She anxiously awaited the opportunity to meet and use drugs with a man of his influence. Bill Daniell, another prosecution witness, was an ex-convict who worked for Trent and was a drug trafficker. Ralph Walker, the stabbing victim, obtained drugs for Trent, collected rent on various properties that Trent owned and assaulted whomever Trent wanted harmed. Like Trent, Walker had a violent temperament. (App. 2-5).

Most of the events surrounding the murder of Walker occurred at Trent's Palm Beach Hotel apartment where Mills, Angelilli, Trent and Walker had consumed cocaine, marijuana and alcohol over a long period of time. Walker picked up a .357 magnum from the table and moved toward Angelilli with the gun in one hand and the bat in the other while demanding sex with Angelilli. Trent knocked the .357 magnum out of Walker's hand. When Walker reached for a .45 in Trent's shoulder holster, Trent pulled it out first and fired it toward Walker but missed him. A fight ensued and Walker was eventually handcuffed. Trent told Angelilli to bring him the murder weapon, a Gerber fighting knife from the closet. Trent

said: "You're dead Ralph Walker! You're dead ... and you're goin' home to your mama in a box." He gagged Walker with a towel and strapped duct tape around Walker's mouth. Daniell and Bruce Fullerton appeared. According to Daniell, Angelilli and Mills, the petitioner appeared as well and injected Walker with magnesium sulfate.[1] (App. 5-7).

Trent retrieved diazepam from his kitchen closet[2] which was injected into Walker. (App 8).

Days later, Mills and Angelilli called the police, related their account of the stabbing and told the police where to find Walker's body in Trent's vehicle. No physical evidence ever connected the petitioner to the homicide. Walker's body fluids revealed high levels of cocaine, alcohol and a derivative of diazepam. The coroner did not find any needle marks. Trent fled to Illinois. The State Attorney's Office did not charge Mills, Angelilli or Daniell with any crime resulting from their involvement in the murder or disposition of Walker's corpse. (App. 11-12).

Unbeknownst to the petitioner, for thirteen years, Trent had extensive dealings with the law firm that would eventually represent him at trial, Foley, Colton and Duncan, P.A. In the early 1970s, Robert Foley began representing Trent in various criminal and civil matters, as did Roger Colton and Douglas Duncan after they joined the law firm. Until May 1984, the law firm represented Trent in various cases and capacities, ranging from civil collection actions involving Trent's business and hotels, to criminal matters. Additionally, during

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[1] Magnesium sulfate is a mild muscle relaxer. Oncologists frequently use this drug to treat symptoms arising from chemotherapy and to replenish the body with magnesium that is lost during the therapy. (App. 7).

[2] Diazepam is a drug that is used to counter the effects of anxiety and alcohol withdrawal. (App. 8).

this time, the law firm and Trent's relationship often exceeded that of attorney and client. Trent and his employees came to the office on a daily basis, sharing the law firm's copier and other office equipment. Trent also performed interior design work for the law firm, Foley, Colton, and Duncan's parents. (App. 12-13).

Trent referred many of his employees and friends, including Mills, to the law firm. Approximately two months before the stabbing, Mills met with Colton at Trent's Palm Beach Hotel apartment for and explained to him the facts and circumstances of her cocaine trafficking charge. Colton and Mills discussed the possibility of her providing assistance to the police.[3] (App. 13).

The law firm represented Trent until May 1984, approximately three months before the stabbing. A year earlier, Trent brandished a gun on a public street and threatened to kill two people. A few days later, advised of the assault incident, the police stopped Trent in his car. The officers discovered diazepam in Trent's possession, the same drug administered to Walker and found in his body by the medical examiner. The law firm represented Trent in both the aggravated assault and diazepam possession prosecutions and the Honorable Marvin Mounts, Palm Beach County Circuit Judge, presided over these prosecutions. Colton and Duncan also represented Trent in the forfeiture proceeding, also before Judge Mounts, through final judgment. Although Trent had retained David Roth as substitute defense counsel in his aggravated assault and diazepam possession cases, he called Colton from Illinois after the stabbing for advice. (App. 13-14).

The petitioner retained the law firm to defend him, unaware of the law firm's relationship with Trent and his

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[3] Also, prior to 1988, Trent referred Daniell to the law firm for representation on a traffic violation for speeding. (App. 13).

associates. Two or three days after the court arraigned the petitioner, Foley called a press conference and announced that the law firm would present an insanity defense. The petitioner's murder case was assigned to Judge Mounts, the same judge who had earlier presided over Trent's assault, diazepam possession and forfeiture proceedings. Two conflict-of-interest issues arose during pretrial proceedings. (App. 15-16).

The first conflict issue arose at the pretrial deposition of Mills when she refused to answer any questions that Duncan asked on the ground that her prior consultation with Colton regarding the cocaine trafficking charge had established an attorney-client relationship with the law firm. The second conflict issue arose less than a month later when the law firm filed a motion to sever Trent's case from the petitioner's. As grounds, the law firm averred that it had represented Trent in the past and might have to cross-examine Trent at the petitioner's trial. The law firm concluded with a statement that it was requesting from the Florida Bar an informal written opinion addressing conflicts of interest. The Bar cautioned the law firm that its prior representations could give rise to conflicts of interest. (App. 15-19). Despite all of the foregoing, Judge Mounts conducted no inquiry of the petitioner concerning conflicts of interest nor obtained from the petitioner a waiver of his right to conflict-free counsel. (See App. 68 n.39).

While the petitioner's motion to sever was still pending, Trent filed his own motion to sever. One of Trent's grounds for severance involved the law firm's relationship with him. Trent alleged that the law firm had acquired confidential information that it could use against him at a joint trial. Judge Mounts conducted a hearing on Trent's severance motion. Trent testified about the attorney-client relationship that had developed between the law firm and himself. Trent stated that during the course of the representation, he had

confided his most personal secrets and business affairs to both Foley and Colton. Trent told the law firm about his participation in multiple criminal activities involving drugs and prostitution. Even after Trent had retained Roth to handle his drug and assault prosecutions, he called Colton from Illinois after the stabbing. Trent explained that at the time of the telephone call, he still considered Colton to be his attorney. (App. 20-21).

Trent's testimony then moved from his professional relationship with the law firm to a more personal and lurid relationship. He had considered Foley and Colton to be close friends in addition to his lawyers. Beyond discussing his criminal activities, Trent would recount to both lawyers the details of his sexual exploits. Trent even showed Foley and Colton a number of "sexual devices," including handcuffs, at the scene of the murder. Trent also contended that he used cocaine in Foley's and Colton's presence, including in their law offices. Trent claimed to have delivered cocaine to the law firm's friends, sometimes at the law firm. He further suggested that he had provided the lawyers with prostitutes on many occasions, often as payment for legal services. Indeed, Trent allegedly provided Foley with "so many [prostitutes] over the years ... it [was] almost a daily occurrence." He alleged that the two attorneys had attended and participated in many of his "sex parties" involving cocaine and prostitutes. For example, on one occasion, Trent and Foley allegedly invited several prostitutes to the offices after the close of business. One of them accidentally tripped the police-monitored burglar alarm. When the police arrived, Trent recounted that he had to answer the door because Foley was naked. (App. 21).

Colton testified and denied Trent's accusations. Foley did not testify or cross-examine Colton. Both Duncan and the assistant state attorney declined to examine Colton. Ultimately, Judge Mounts granted the severance. (App. 21-22).

Trent was tried first. The trial resulted in a hung jury, and the court declared a mistrial. In a plea bargain, the State Attorney's Office reduced the first degree murder charge in exchange for Trent's pleading guilty to second-degree murder. The court sentenced Trent to a 17-year sentence, and prison authorities have since released him. (App. 23).

After Trent pleaded guilty to second-degree murder, the State Attorney's Office offered the same deal to the petitioner. The law firm advised the petitioner that the defense of insanity was successful 30 percent or less of the time. Rejecting the offer on behalf of the petitioner, Foley stated to the assistant state attorney that the defense was holding out for a verdict of manslaughter or not guilty by reason of insanity. Thus, the State brought the petitioner to trial and Duncan and Foley served as his trial lawyers. (App. 23).

The State first introduced most of the physical evidence through the testimony of various police officers who conducted the investigation. None of that evidence implicated the petitioner. The prosecution also presented the results of Walker's autopsy through the testimony of the conducting pathologist who confirmed that Walker's body fluids revealed high levels of cocaine, alcohol and a derivative of diazepam, but no magnesium sulfate, and that stabbing caused Walker's death. Through the testimony of Mills, Angelilli and Daniell, the State presented the aforementioned details of the murder. While cross-examining Mills, Duncan asked a series of questions about how she came to know Trent and about her prior arrest for trafficking cocaine. Duncan had her recount the basic background of that pending charge and Trent's assistance from shortly after her arrest until her one and only meeting with Colton. However, Duncan stopped short of asking Mills about her consultation with Colton. (App. 23-25).

After the prosecution rested its case, Duncan and Foley presented the petitioner's insanity defense. The prosecution called its own expert witness on rebuttal. The last witness that

the State called on rebuttal, and the last witness of the entire trial, was James Stob, a friend of the petitioner. Stob testified that he visited the petitioner in jail shortly after his arrest. Stob was told by the petitioner that he did not kill Walker. At no time did the State call Trent to testify. (App. 30-32).

The closing arguments focused on the petitioner's insanity at the time of the stabbing, until Duncan turned the argument over to Foley. Foley argued to the jury that the prosecution's witnesses were liars, that the petitioner might not have killed Walker, and that Trent had committed the murder. Foley told the jurors the following: "I always wondered whether Trent did it and told this poor guy, 'You did it. My colleagues here are telling you did it.'" In the State's final closing argument, in addition to refuting the insanity defense, it addressed Foley's statements: "Now, Mr. Foley tells you we are not even sure if [the petitioner] stabbed Walker. That's ridiculous." After receiving their instructions from Judge Mounts, the jury deliberated for a total of three hours over two days and returned a verdict of guilty of murder in the first degree. (App. 32-33).

The law firm represented the petitioner on direct appeal. On grounds unrelated to this certiorari petition, both the Fourth District Court of Appeal and the Supreme Court of Florida affirmed the petitioner's conviction. See *Freund v. State*, 506 So. 2d 437 (Fla.4th DCA 1987), *aff'd*, 520 So. 2d 556 (Fla.1988). (App. 34).

Through new counsel, the petitioner filed a motion to vacate the judgment and sentence, pursuant to Florida Rule of Criminal Procedure 3.850 (the "3.850 motion"), in the state circuit court that tried and sentenced him. The petitioner argued that the law firm's conflicts of interest denied him his constitutional right to the effective assistance of trial counsel. An evidentiary hearing (the "3.850 hearing") was conducted. Duncan testified and conceded that the State's physical evidence (e.g., the apartment, murder knife, handcuffs, guns,

baseball bat, steamer trunk and location of the body) inculpated Trent, not the petitioner. He further conceded that the coroner did not discover any magnesium sulfate in Walker's body or physical evidence connecting the petitioner to the murder. Duncan claimed that the petitioner admitted to him and Foley that he had stabbed Walker. But Duncan acknowledged that Foley argued to the jury that the petitioner might not have killed Walker and that Trent was the killer. The court denied the petitioner's motion for post-conviction relief in a conclusory written order which found that no conflict of interest existed. (App. 34-40).

The petitioner filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Southern District of Florida. Consistent with his 3.850 motion, the petitioner alleged that the law firm's conflicts of interest denied him effective assistance of trial counsel. The United States Magistrate Judge reviewed the record and issued a report and recommendation that the petition be denied. (App. 118-134). The district court overruled the petitioner's objections, adopted the report and recommendation and denied the petition. (App. 135-136). The petitioner appealed to the United States Court of Appeals for the Eleventh Circuit and the panel reversed. *Freund I.* The panel reasoned that the petitioner's claims turned upon interpretation and application of the rule stated in *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), that in order to prevail upon an ineffective-assistance-of-counsel claim based upon a conflict of interest, a habeas petitioner must demonstrate that an "actual conflict of interest adversely affected his lawyer's performance." The panel concluded that in order to prove that the law firm's performance was hindered by an "actual conflict", the petitioner was required to demonstrate a "factual showing of inconsistent interests." *Freund I*, 117 F.3d at 1572. The panel found that the petitioner had made such a showing

based upon at least three separate instances of conflicts of interest: "(1) the law firm's prior representation of Trent; (2) the law firm's prior representation of Mills; and (3) the allegations of embarrassing and illegal conduct leveled by Trent against members of the law firm...". *Id.*

After analyzing each of the three sources of conflict, *Freund I*, 117 F.3d 1572-79, the panel sought to define what the *Cuyler* decision meant by "adverse affect". To establish adverse affect, the panel concluded, the petitioner was required to prove three elements. First, he must point to "'some plausible alternative defense strategy or tactic [that] might have been pursued.'" *Freund I*, 117 F.3d at 1579-80 (quoting *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir.1985)). Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. But because prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668, 692 (1980), the petitioner "'need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used'"; instead, [the petitioner] was required only to prove that the alternative "possessed sufficient substance to be a viable alternative.." *Freund I*, 117 F.3d at 1580 (quoting Fahey, 769 F.2d at 836). Third, the petitioner was required to show "some link between the actual conflict and the decision to forgo the alternative strategy of defense." *Freund I*, 117 F.3d at 1580.

The petitioner satisfied these tests, the panel concluded, noting that the law firm, immediately upon being retained, announced an insanity defense, thereby foregoing the reasonable alternative defense strategy of denying guilt by blaming the murder on Trent. "Such a strategy would have been more than reasonable under the facts of this case. The State had a very weak evidentiary case against the petitioner. No physical evidence inculpated [the petitioner]. The only evidence that [the petitioner] was present at the scene of the murder was the testimony of Mills, Angelilli, and Daniell, all

of whom suffered significant credibility problems", and all of whom were loyal to Trent and "feared retribution from Trent if they implicated him". *Freund I*, 117 F.3d at 1580. By invoking the insanity defense, the law firm furthered its own interests by not directly blaming Trent for the murder and also avoided the need to use information it obtained in its prior representation of Trent. Thus, the record proved "an actual conflict that adversely affected the law firm's representation of [the petitioner], in violation of *Cuyler*." *Freund I*, 117 F.3d at 1582.

The majority of the en banc court disagreed. With regard to the law firm's prior representations of Trent, the majority found that these raised only a "potential conflict of interest." (App. 58). The majority reached the same conclusion as to the law firm's prior representation of Mills. (App. 59-60). As for Trent's allegations against the law firm, the majority found that there was no actual conflict because the "damage was done." (App. 60-1). The en banc majority further reasoned that Duncan's testimony that the petitioner admitted to him that he stabbed Walker precluded the law firm from blaming Trent for the murder, citing *United States v. Cronic*, 466 U.S. 648 (1984) and *Nix v. Whiteside*, 475 U.S. 157 (1986). (App. 64).

ARGUMENT

WHETHER (A) THE FINDING THAT THE PETITIONER WAIVED HIS RIGHT TO CONFLICT-FREE COUNSEL BY HAVING FAILED TO "EXPRESS DISSATISFACTION" WITH HIS COUNSEL CONFLICTS WITH *UNITED STATES v. CRONIC*, 466 U.S. 648 (1984) AND *JOHNSON v. ZERBST*, 304 U.S. 458 (1938); (B) A TRIAL COURT'S FAILURE TO CONDUCT AN INQUIRY, DESPITE BEING ALERTED IN PRETRIAL PROCEEDINGS TO COUNSEL'S ACTUAL CONFLICTS OF INTEREST, CONSTITUTES SIXTH AND FOURTEENTH AMENDMENT VIOLATIONS UNDER THIS COURT'S DECISIONS IN *HOLLOWAY v. ARKANSAS*, 435 U.S. 475 (1978) AND *WOOD v. GEORGIA*, 450 U.S. 261 (1981) AND MANDATES A NEW TRIAL IN THE ABSENCE OF A VALID WAIVER BY THE PETITIONER OF HIS RIGHT TO CONFLICT-FREE COUNSEL?

Prior to the petitioner's trial, the state trial judge, Judge Mounts, was made aware of the law firm's conflicts of interest on several occasions. Judge Mounts presided over the prior cases where Trent was represented by the law firm. Judge Mounts also presided over the pretrial severance hearing where Trent made his accusations against the law firm and disclosed his relationships with the law firm as well as the relationships the law firm had with the prosecution witnesses against the petitioner. Judge Mounts was also advised by the law firm that it was seeking an advisory opinion from the Florida Bar regarding conflicts of interest because of the firm's prior relationships with Trent. Despite the foregoing pretrial events which placed Judge Mounts on notice of the conflicts of interest, the judge conducted no inquiry into the conflicts of interest, did not advise the petitioner the possible conflicts, nor

afford the petitioner the opportunity to obtain independent counsel or enter a knowing and intelligent waiver of his Sixth Amendment right to conflict-free counsel.

Nevertheless, the United States Magistrate Judge ruled that the "the state court sufficiently fulfilled its duty of inquiring into a possible conflict at Trent's severance hearing" and that the petitioner "never expressed any dissatisfaction with his counsel." (App. 130 n.5). The judgment of the district court adopted the magistrate's report without any findings. (App. 135-136). The en banc court affirmed the district judge's judgment on the issue without discussion. (App. 68 n.39).

The ruling of the court of appeals conflicts with *Cronic* wherein this Court stated: "If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. It is for this reason that we attach no weight to ... respondent's expression of satisfaction with counsel's performance at the time of trial ....". *Cronic*, 466 U.S. at 657 n.21, 104 S.Ct. at 2046 n.21. The reasoning of *Cronic* necessarily applies in the conflict of interest and waiver contexts. At issue in *Cronic* was whether the accused was afforded effective assistance of counsel at trial. The accused based his claim of ineffectiveness solely upon defense counsel's youth and inexperience and the complexity of the charges without any proof of actual ineffectiveness. In pertinent part, this Court reasoned that the appropriate inquiry must focus upon whether the adversarial process contemplated by the Sixth Amendment has taken place, not upon the relationship of the accused with his lawyer. *Cronic*, 466 U.S. at 657, 104 S.Ct. at 2046 n.21.

The Sixth Amendment right to effective assistance of counsel ensures the right to conflict-free counsel. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Consequently, the focus here, in the context of conflict of interest, is the same as that in *Cronic*, namely, the adversarial process which resulted in the petitioner's conviction, not the

petitioner's relationship with the law firm. Having been defended by counsel suffering from the restrictions of the conflict, the petitioner was denied the right to assistance of counsel. See *Herring v. New York*, 422 U.S. 853, 857, 95 S.Ct. 2550, 2553, 45 L.Ed.2d 593 (1975) ("[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments.")

The same concerns govern the determination whether the petitioner waived the right to conflict-free counsel. Mere acquiescence has long been distinguished from a knowing and intelligent waiver of a constitutional right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). And that is certainly the case where, as here, the acquiescence was unknowing, unintelligent and emanating from an accused suffering mental problems. The reasoning of *Cronic* is particularly appropriate where, as in the case at bar, the law firm had averred that the petitioner was mentally incompetent and unable to assist in his defense.

In any event, the criteria for waiver cannot be satisfied on this record due to the total absence of evidence that the petitioner either realized that the conflicts of interest could affect his defense or knew of the right to obtain other counsel. Rather, the record merely shows, at best for the prosecution, that the petitioner was made aware of possible conflicts of interest during unreported off-the-record conversations with the very counsel who suffered from those conflicts and who had a significant financial incentive to persuade the petitioner not to seek other counsel. See *Freund I*, 117 F.3d at 1582-83.

Moreover, in obtaining waivers of the right to conflict-free counsel, affirmative judicial involvement must be required for the reasons stated by this Court in *Von Moltke v. Gillies*, 332 U.S. 708, 168 S.Ct. 316, 92 L.Ed. 309 (1948) in the context of the waiver of the right to counsel. The same

principles governing the right to effective assistance of counsel in general apply to the right to conflict-free counsel and the waiver thereof in particular.

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), this Court held that the trial court's failure to conduct an inquiry, despite representations made in pretrial proceedings alerting the court to a potential conflict of interest, deprived the defendant of the right to effective assistance of counsel. 435 U.S. at 484. Similarly in *Wood v. Georgia*, 450 U.S. 261 (1981), this Court found that the defendant's due process rights were violated where the trial court failed to inquire into defense counsel's potential conflict of interest where the court "should have been aware of the problem." 450 U.S. at 272-73.

To resolve the conflict between the decision below and the above-cited decisions of this Court, certiorari review is requested.

Additionally, in noting the claimed violations of *Holloway* and *Wood*, the panel in *Freund I* found it unnecessary to reach their merits given its finding that the petitioner was otherwise entitled to habeas relief for the "substantive" Sixth Amendment violations. The panel did suggest, however, that this Court's rulings on the issue in *Holloway* and *Wood* involved "claims of procedural, pretrial errors by the trial court, as opposed to a more substantive Sixth Amendment claim that trial counsel was ineffective." *Freund I*, 117 F.3d at 1570 n.62. In drawing this distinction, the panel believed that a "*Holloway-Wood* claim" would "require us to determine and evaluate the facts that the trial court knew, or reasonably should have known, before the trial commenced, then determine whether the trial court should have predicted that these facts might prejudice Freund at trial, and then second-guess the trial court's implicit decision not to conduct sua sponte a thorough inquiry" whereas an analysis of the Sixth Amendment claim "focuses on what actually happened: was counsel's representation unconstitutionally ineffective?"

Id.

The reasoning of the panel may have contributed to the affirmance by the en banc majority. The thinking that a *Holloway-Wood* claim is "procedural" and thereby distinguishable from a "substantive" constitutional claim under either the Sixth Amendment right to effective assistance of counsel or the Due Process Clause of the Fifth or Fourteenth Amendment, finds no support in the language of either *Holloway* or *Wood*, but remains the law of the Eleventh Circuit.

The issue is significant and is also worthy of review, not simply in the context of this case, but also in others. For example, the Eleventh Circuit noted that the same distinction applies where an accused claims he was incompetent at the time of trial. *Id.*

WHETHER: (A) THE COURT OF APPEALS ERRED IN RULING THAT THE SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL IS NOT VIOLATED WHERE COUNSEL LABORS UNDER PERSONAL CONFLICTING INTERESTS AND IN INTERPRETING *CUYLER v. SULLIVAN*, 446 U.S. 335 (1980) AS PROHIBITING COUNSEL FROM LABORING UNDER CONFLICTS OF INTEREST IN ONLY TWO CONTEXTS: (1) COUNSEL'S "SIMULTANEOUS REPRESENTATION" OF CLIENTS WITH CONFLICTING INTERESTS; AND (2) COUNSEL'S "SUCCESSIVE REPRESENTATION" OF CLIENTS WITH CONFLICTING INTERESTS AGAINST WHOM A FORMER CLIENT APPEARS AS A WITNESS; (B) THE TEST ADOPTED BY THE COURT OF APPEALS FOR PROVING AN "ACTUAL CONFLICT OF INTEREST" IN THE SUCCESSIVE REPRESENTATION CONTEXT MISINTERPRETS *CUYLER* AND THE SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL AND ALSO CONFLICTS WITH *UNITED STATES v. FULTON*, 5 F.3d 605 (2d Cir.1993) BY REQUIRING THE HABEAS PETITIONER TO SHOW THAT COUNSEL'S PRIOR REPRESENTATION WAS SUBSTANTIALLY RELATED TO THE PRESENT CASE OR INVOLVED A DISCLOSURE OF CONFIDENTIAL INFORMATION, AND BY FINDING INSUFFICIENT AS A MATTER OF LAW THE PETITIONER'S SHOWING A CONFLICT ARISING FROM HIS COUNSEL'S OWN PERSONAL CONFLICTING INTERESTS.

In *Cuyler*, this Court held that a defendant in a criminal case who claims that he was denied his Sixth Amendment right to the effective assistance of counsel because his attorney

labored under a conflict of interest must show that (1) an actual conflict of interest (2) adversely affected his attorneys performance. 446 U.S. at 348. In *Strickland v. Washington*, *supra*, this Court further explained the standard for analyzing conflict of interest cases as follows:

> In *Cuyler* ... [we] held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts ... it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of presumed prejudice that exists for the Sixth Amendment claims mentioned above [actual or constructive denial of the assistance of counsel altogether]. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that an "actual conflict of interest adversely affected his lawyer's performance."

In the case at bar, the en banc majority relied upon *Smith v. White*, 815 F.2d 1401 (11th Cir.), *cert. denied*, 484 U.S. 863 (1987), which established the Eleventh Circuit's exclusive test for proving *Cuyler*'s first prong, "actual conflict of interest", in the successive representation context. In order to establish an actual conflict under this test, the petitioner

must make "a showing of 'inconsistent interests.' " *Smith*, 815 F.2d at 1405. According to the en banc majority, *Smith* makes proof of either substantial relatedness or disclosure of confidential information a necessary prerequisite to a finding of inconsistent interests. Even where a petitioner proves both, however, the court held that this may not be sufficient to establish actual conflict -- "other proof of inconsistent interests" also may be required. (App. 45). Implicit in its interpretation of *Smith* is the majority's view that "other proof of inconsistent interests," standing alone, can never be sufficient to establish an actual conflict of interest.

This analysis raises the question posed by the dissenting opinion below (App. 70-1), namely, whether *Cuyler* is limited to two contexts: a lawyer's "simultaneous representation" of clients with conflicting interests, and a lawyer's "successive representation" of a client against whom a former client appears as a witness. Prior to the decision in the case at bar, the Eleventh Circuit applied *Cuyler* beyond the two contexts. See, *e.g.*, *Zamora v. Dugger*, 834 F.2d 956, 960-61 (11th Cir.1987) (noting that "the standard developed in Cuyler has been applied to cases in which defendants argue that their lawyers were more interested in publicity than in obtaining an acquittal); *United States v. McLain*, 823 F.2d 1457, 1463 (11th Cir.1987) (finding *Cuyler* requirements met where attorney faced possible prosecution by same United State's Attorney's office that was prosecuting his client). The Ninth Circuit similarly viewed *Cuyler* as not so limited. See *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1251-53 (9th Cir.1989) (finding denial of effective assistance of counsel where lawyer failed to present evidence that would exculpate current client at expense of non-testifying former client). However, the Fifth Circuit in *Beets v. Scott*, 65 F.3d 1258 (5th Cir.1995) (en banc) noted: "Although the federal circuit courts have unblinkingly applied *Cuyler*'s 'actual conflict' and 'adverse effect' standards to all kinds of alleged attorney ethical

conflicts, a careful reading of the Supreme Court cases belies this expansiveness." *Id.* at 1266. By contrast, the panel opinion in *Beets* had concluded: "Together, [*Strickland v. Washington* and *Wood v. Georgia*, 450 U.S. 261] suggest that the *Cuyler* analysis may not be limited to conflicts of interest involving [simultaneous] or successive representation. Consequently, it is no wonder that this court and others have recognized numerous circumstances in which an attorney has breached the duty of loyalty." *Beets v. Collins*, 986 F.2d 1478, 1481 (5th Cir.1993), *modified*, 65 F.3d 1258 (5th Cir.1995).

Review is requested to determine and/or clarify the scope of *Cuyler* and resolve these conflicting views.

Review is also warranted because the rule of law announced by the en banc majority should be deemed inapplicable where, as here, a petitioner claims his counsel labored under a conflict of interest because counsel's personal interests were at odds with the interests of his client. On this issue, the en banc decision conflicts with *United States v. Fulton*, 5 F.3d 605 (2d Cir.1993), which provides the proper framework for assessing claims that "the personal interests of the attorney and the interests of the client are in actual conflict." *Id.* at 609. In such a case, the accused can meet his burden of proving actual conflict of interest by showing that his counsel's own personal interests would be compromised by pursuing a certain defense. See *Fulton*, 5 F.3d at 609 ("A situation in which the attorney's own interests diverge from those of the client presents the same core problem presented in the multiple representation cases: the attorney's fealty to the client is compromised.").

As the dissenters noted below, the petitioner clearly satisfied the more appropriate standard under *Fulton* as follows:

> After the firm decided to oppose Trent's motion for severance on Freund's behalf, Trent made

> serious allegations against Foley and Colton at the severance hearing. If the firm antagonized Trent again by defending Freund on the theory that Trent murdered Walker, it certainly was possible that Trent would produce evidence to support his allegations. Foley and Colton would then be at risk of being disciplined by the Florida Bar or prosecuted by the State. Plainly, then, it was in the firm's best interests not to defend Freund by implicating Trent in Walker's murder.

(App. 105-06).

This Court is urged to resolve this important conflict in decisions.

Another important question for review is whether the ruling below, that in order to obtain relief for conflicting successive representations, an accused must prove either substantial relatedness or disclosure of confidential information, and that other proof of inconsistent interests, standing alone, can never be sufficient to establish an actual conflict of interest, can be squared with the Sixth Amendment right to conflict-free counsel. The petitioner believes that this ruling finds no support in any of this Court's Sixth Amendment jurisprudence and warrants certiorari review.

DOES THE DECISION OF THE COURT OF APPEALS CONFLICT WITH *HOLLOWAY v. ARKANSAS*, 435 U.S. 475 (1978) AND DID THE COURT OF APPEALS ERRONEOUSLY INTERPRET *UNITED STATES v. CRONIC*, 466 U.S. 648 (1984), *NIX v. WHITESIDE*, 475 U.S. 157 (1986) AND ETHICAL CONSIDERATIONS IN RULING THAT COUNSEL FOR AN ACCUSED IS PROHIBITED FROM PRESENTING A BLAME-SHIFTING DEFENSE WHERE THE ACCUSED HAS TOLD COUNSEL THAT HE COMMITTED THE CRIME CHARGED AND WHERE COUNSEL LABORED UNDER CONFLICTS OF INTEREST WHICH DETERRED THE INVESTIGATION AND PRESENTATION OF A BLAME-SHIFTING DEFENSE?

The en banc majority held that the petitioner's pretrial incriminating statement made to the law firm rendered unreasonable any defense that the co-defendant, Trent, was the murderer. Moreover, the majority reasoned, the law firm's members could have been disbarred if they defended the petitioner by claiming that Trent had committed the murder. As support for its ruling, the majority cited *United States v. Cronic*, 466 U.S. 648 (1984) and *Nix v. Whiteside*, 475 U.S. 157 (1986).

The dissenters responded that it was not clear that the law firm had cause to be certain that the petitioner was guilty as claimed: the petitioner had also made exculpatory statements (a prosecution witness testified that when he visited the petitioner in jail prior to trial, the petitioner stated that he had not killed Walker; also, some of the symptoms caused by the petitioner's brain damage were impaired memory and amenability to influence by others). See *Freund I*, 117 F.3d at 1548, 1563-64. Additionally, the law firm acted inconsistently with an abiding belief in the petitioner's incriminating

statement by arguing to the jurors that Trent could have been the murderer. Even if the law firm did believe the petitioner were guilty, the dissenters reasoned, the petitioner would still be entitled to counsel who would be unconstrained by conflicts of interest from putting the State to its burden of proof by vigorously cross-examining the State's witnesses and by arguing to the jury in closing that the evidence presented at trial did not establish guilt beyond a reasonable doubt. Such a vigorous cross-examination could have ethically extended even to matters about which the lawyers either knew or believed that the witness was telling the truth. See ABA Standards for Criminal Justice Standard 4-7.6(b) (3d ed. 1993) ("Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination."). "Therefore, it would have been entirely permissible for Freund's lawyers to argue in closing that a reasonable doubt existed as to Freund's guilt because the jury could infer from the evidence that Trent had killed Walker." (App. 111).

The majority's view of *Nix* and *Cronic* should be reviewed by this Court. There is no dispute that counsel must not present perjured testimony. *Nix* stands for the proposition that the refusal to do so does not constitute ineffective assistance of counsel. But in the case at bar, *Nix* was improperly applied by the majority because the law firm was never called upon to present perjured testimony. The law firm was, however, required to meet its constitutional duty to the petitioner to conduct a reasonable investigation into the prosecution's allegations and pursue all viable avenues of defense without suborning perjury. *Nix* does not countenance the law firm's failure in that respect, particularly where, as here, the failure was attributable to the firm's conflicts of interest.

Nor does *Cronic* "cure" the Sixth Amendment violation of the petitioner's right to conflict-free counsel. In *Cronic*, this Court stated in pertinent part: "Of course, the

Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one ...". There is no dispute but that the evidence strongly supported Trent's guilt as the murderer. Cf., *Cronic*, 466 U.S. at 656 n.19. Nor did the law firm ever contend that its hastily announced decision to present an insanity defense was based upon the petitioner's incriminating statement to counsel. To the contrary, as noted, petitioner's counsel argued to the jury that a verdict of not guilty would be appropriate based upon a finding that Trent was the actual murderer, although the argument was entirely undermined by counsel's insanity defense which presumed that the petitioner, not Trent, had killed the victim. The closing argument of petitioner's counsel showed that the law firm did not believe that a blame-shifting defense was not available due to the petitioner's incriminating statement limited the defensive options. But the en banc majority came to a different conclusion. In effect, the court of appeals found that the petitioner's pretrial incriminating statement to his trial counsel effectively "immunized" the law firm from any claim that its conflicts of interest violated the Sixth Amendment. This rule has far-reaching ramifications of constitutional and ethical dimensions worthy of review.

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), this Court noted that reversal for violation of the right to conflict-free counsel can be appropriate "even if no particular prejudice is shown and even if the defendant was clearly guilty." 435 U.S. at 489. In conflict with *Holloway*, the court of appeals has ruled that the guilt of the petitioner, or at least the law firm's

testimony that the petitioner "confessed" the crime to the firm, vitiates the petitioner's Sixth Amendment claim. That ruling warrants review by this Court as well.

Respectfully submitted,

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